IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 603.

RAY CONSOLIDATED COPPER COMPANY,

A CORPORATION, PLAINTIFF IN ERROR,

vs.

DAN VEAZEY, DEFENDANT IN ERROR.

BRIEF OF AMICUS CURIÆ ON BEHALF OF PLAINTIFF IN ERROR.

The validity of the Arizona Employers' Liability Law is attacked in five cases now pending in this court, namely: Arizona Copper Company, Limited, *vs.* Richard Bray, and Arizona Copper Company, Limited, *vs.* Joseph B. Hammer, argued and submitted on January 26, 1918; the above-entitled cause argued and submitted on January 28, 1918; and Inspiration Consolidated Copper Company *vs.* Mendez, 166 Pacific, 278, 1183, No. 819 on the Docket of this court, and Superior and Pittsburgh Copper Company *vs.* Tomich, 165

Pacific, 1101, 1185, both decided by the Supreme Court of Arizona on July 2, 1917, and pending here on writ of error.

In view of the fact that the last-named cases were not in condition to be heard by this court with the cases heretofore submitted, upon motion of counsel in the above-entitled cause, this court on January 28, 1918, granted leave to the undersigned, as counsel for Inspiration Consolidated Copper Company in the Mendez case, to file herein a brief as *amicus curiæ*. This brief is accordingly filed in accordance with this leave.

The Arizona statute has been challenged in each of these cases upon the ground that it deprives the employer of his property without due process of law, and denies to him the equal protection of the laws, and therefore offends against the Fourteenth Amendment.

The specific charge is that under the guise of a police measure, the law in fact imposes an unlimited liability without fault upon the employer, giving him no right to defend, and, therefore, no day in court, and that it is unreasonable and arbitrary and constitutes an unwarranted interference with individual rights, and sustains no reasonable relation to the public interest.

If this specification appears indefinite it is so because of the undefined scope of the police power by which this law is to be tested. While recognizing that this great governmental power is not without limitation, this court has consistently refrained from attempting any precise definition of it or any concrete specification of the limits of its proper exercise. It is held that each case coming here involving the police power must be decided upon its own peculiar facts; hence the line which separates the valid from the invalid law must continue to be shadowy and indistinct. As Justice Holmes said in Noble State Bank *vs.* Haskell, 219 U. S., 104, at page 112:

> "With regard to the police powers, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

There are, however, some definite principles to be deduced from the decisions of this court. It has been recognized in all of the cases that free government rests primarily upon the inviolability of private right, and that the public welfare can justify interference with private right only to the extent which is reasonably necessary in view of the particular public need. Without multiplying citations, it is sufficient to refer to the following cases:

Holden *vs.* Hardy, 169 U. S., 366-389.
Fletcher *vs.* Peck, 4 Cranch, 87-135, 139.
Humes *vs.* Ry. Co., 115 U. S., 521.
Davidson *vs.* New Orleans, 96 U. S., 97.
Chicago Railway *vs.* Chicago, 166 U. S., 226, 237.

As Justice Holmes said in the Haskell case, "the police power extends to all the great public needs" (219 U. S., at 111). The public need, therefore, is at once the justification for and the limitation upon the exercise of the police power. When the public need requires an interference with private right, the extent of the need defines the extent of permissible interference. This is all that is meant by the diverse statements of this court as to the requirement of reasonableness in all public measures. Thus far free government may go. Government may go further, but in doing so it ceases to be free government. (See the dissent of Justice Day in Coppage *vs.* Kansas, 236 U. S., at page 30.)

Said this court in Lawton *vs.* Steele, 152 U. S., 133, at 137:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may never, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restric-

> tions upon lawful occupations. In other words, its definition as to what is a proper exercise of police powers is not final or conclusive, but is subject to the supervision of the courts."

The principle, then, is this: A law in the nature of a police measure will be sustained if it reasonably corresponds to the public need.

What is the public need or interest with relation to the matter of responsibility of employers for non-negligent injuries to their employees? This question has been fully and explicitly answered by this court in New York Central R. R. Co. *vs.* White, 243 U. S., 189, at 207, where, in answering the criticism that the New York act under consideration did not concern itself with measures of prevention, Justice Pitney said:

> "But the interest of the public is not confined to these (measures of prevention). One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime."

This is the crux of the question. The public must care for its subjects if for any cause they become unable to care for themselves. Some accidents are bound to occur in industry in the entire absence of negligence. The public is therefore interested in avoiding pauperism resulting from loss or impairment of earning power due to non-negligent injury, and it is competent for the State to make provision reasonably necessary to accomplish this purpose. Nowhere is this proposition stated with greater clarity or force than in the dissent of Justice Brandeis in New York Central Railway Company *vs.* Winfield, 244 U. S., 147, at 165.

The public interest may find expression in widely divergent laws so far as their form is concerned, but the question of their validity comes always to this: Is the particular law reasonable? Is it reasonably necessary to safeguard the par-

ticular specific interest of the public as distinguished from that of some special class? It is not what the employer would consider reasonable, nor, again, what the employee or his dependents would consider fair, but what the public, which comprises both and protects both, considers fair in view of its public duty. That question is a judicial question for the courts, and ultimately, in each case, for this court.

There is no occasion for confusing the question of power with the question of policy. The State has power to pass reasonable and appropriate laws necessary to protect its people in their health, safety, and essential welfare. It has no power to pass unreasonable or unfair laws for any purpose. The concrete question in each case is whether the State has exceeded this power. That this is a judicial question, as above intimated, this court has unvaryingly held. (Lawton *vs.* Steele, 152 U. S., 133, at 137; Holden *vs.* Hardy, 169 U. S., 366, at 398.)

This court said in Lochner *vs.* New York, 198 U. S., 45, at 56:

> "This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court."

The precise judicial question here then is whether the Arizona law is a fair, reasonable, and appropriate means for protecting the public from the pauperism of workmen injured in industry.

This whole subject has been so recently and so thoroughly covered by the decisions of this court in the three cases involving the compensation acts of New York, Iowa, and Washington, that we naturally turn to those decisions for criteria to aid us in answering this question.

Those cases involved compensation systems, not liability laws. This court has made it clear that all compensation laws recognize the breaking down of the common law, with its traditional individualistic conception of tort or wrong as the sole basis of liability, as a solution of the problem of meeting losses from industrial injuries. As Justice Pitney said in the White case:

> "* * * it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected and to the community, whether the proximate cause be culpable or innocent."

In short, "attention should be directed not to the employer's fault, but to the employee's misfortune," if "social justice" is to be attained. Dissent of Justice Brandeis, New York Central Railway Co. *vs.* Winfield, 244 U. S., at page 165. The compensation system does not affect an "increase of the employer's liability" (*Id.*, page 167). It imposes an obligation "in the nature of a tax" (*Id.*, 167). It recognizes that the fund, no matter how raised, is to be administered for the benefit of society as a whole, not for industry nor for labor.

As Justice Pitney said in the White case, 243 U. S., at page 205, the legislature in that case overlooked the proximate cause of the injury and concerned itself with the ultimate cause, which is "the employment itself." "For this both parties are responsible, since they voluntarily engaged in it as co-adventurers with personal injury to employee as a probable and foreseen result" (*Id.*, page 205).

Again, the possibility of personal injury which confronts the workman presupposes an impairment or possibly complete loss of his earning power (243 U. S., at 203). "The physical suffering," says Justice Pitney, "must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another."

Furthermore, the laws under consideration in the compensation cases possess attributes of reasonableness which appeal at once to the rational and fair-minded man. They abolish

personal injury litigation, either by express provision or by the necessary effect of their operation. They free the employer from the danger of excessive recoveries, and secure to the employee fair and prompt compensation, and provide that all moneys collected, from whatever source, shall go where they are intended to go, instead of being dissipated in large part for court costs and medical and legal fees. In short, they voice the "strong and preponderant opinion" of mankind that thus only can this difficult problem be solved. These features illustrate forcibly the proper spirit of reasonableness to be expected in appropriate and necessary police measures.

While much leeway must naturally be left to the sense of fairness of the legislature in details which are not finally determinative of the validity of the law, certain definite and controlling principles can be gleaned from the decisions of this court in these cases.

In the first place, the law must recognize the joint responsibility of master and servant. Any law that places the entire burden on either, regardless of fault, must be essentially unreasonable if the principle established by this court is to stand.

In the second place, the measure of compensation must have a fair relation to the loss which is to be borne. The only loss with which the public is concerned or can be concerned is the financial loss due to impaired earning power. The public has no concern with personal suffering entailed by injury, at least no such concern as will justify it in including that as an element of compensation. Physical suffering is something which not only must be borne by the individual, but which, in the very nature of the case, cannot be estimated in terms of money. Any law, therefore, which authorizes, or in its operation as construed by the State courts, permits recoveries based on pain and suffering and other kindred elements must be essentially unreasonable if the sensible distinction of this court is to be sustained.

In the third place, it follows from the two principles already laid down that the public interest in the solution of this problem requires a fair apportionment of the financial loss to the end that the workman and his dependents, on the one hand, may not suffer unduly by reason of these inevitable casualties; and that the industry, on the other hand, shall not be unduly burdened in this behalf. Any law to be sustained, therefore, must possess those elements of fairness, those compensating features to both parties, which enabled this court so properly to declare that the three laws under consideration in the compensation cases were not inherently arbitrary or contrary to the dictates of natural justice.

It is in the light of these principles that the Arizona law must be tested.

In order to understand its operation it is necessary to view it as a part of the local liability system. It is one of three remedies for industrial injury. The common-law liability for negligence and the action for wrongful death are preserved in Arizona. The law under consideration creates a liability for non-negligent injury and death. Thus the entire field of negligent and non-negligent injury and death is covered by litigation. The same field is likewise covered by the compensation act, which provides for compensation for negligent and non-negligent injuries regardless of the cause of the accident. Both the liability law and the compensation act purport to deal with hazardous occupations. In each a list of ten employments is set forth, practically identical in terms, which cover substantially the whole field of industry in Arizona in which any considerable number of workmen are employed or any considerable amount of capital is invested. Arizona is a new State, and its industries are not widely diversified. Mining and transportation and the mechanical trades connected with them, in which are utilized machinery and mechanical and electrical power, furnish the chief employment of Arizona labor. Likewise the population, particularly at the seats of these industries, is divided

roughly between employer and employee, with the latter greatly in the majority, since these industries are practically all operated by corporate agencies. There is an absence in the State of those disinterested classes, more or less impartial as between labor and capital, from whom in the older States jurors may frequently be obtained for service in the trial of injury cases. The State law permits a majority of nine of a jury to render a verdict. Under these circumstances comparatively few injured workmen resort to the compensation act, and as is quite natural the great majority resort to the courts, with the result that the tribunals, both State and Federal, find their chief activity in deciding cases between master and servant. It is the attractiveness of litigation, and not the defects of the compensation act that brings this about.

The law under consideration declares the employer liable to damages in the enumerated occupations in all cases of injury from accidents arising out of and in the course of the employment and due to a condition or conditions of it, and not caused by the negligence of the workman. In case of death there is a liability to the dependent relatives of the workman, and in default of such, to the estate.

The term due to a condition of the work is a novel one. It finds no place in labor legislation, and has therefore never received judicial definition outside of Arizona. It has not been defined with great clearness in that State. However, its operation as a basis of liability has been made sufficiently clear for the purpose of these cases. In the Hammer and Bray cases, argued here on January 26, the United States District Court instructed the jury that the employer was liable under this law, even though he were wholly free from fault. (See printed extracts from the record in the Hammer case, page 14, and in the Bray case, page 12.) In the Mendez case, 166 Pacific, 278, the record of which is here but has not been printed, the trial court instructed the jury that the term "condition of the work" did not include conditions due to the employer's negligence. In short, that liability did not

depend at all upon the employer's fault. The Supreme Court recognized that no question of fault was presented, and that the judgment must be sustained, if at all, in the entire absence of charge and proof of fault. This law, as uniformly construed by the local courts, authorizes recovery in the entire absence of negligence on the part of the employer.

Again, it would not be expected that a legislature adopting such a drastic liability should provide for effective defenses against its enforcement. The act, however, declares that all questions of assumption of risk and contributory negligence under this law shall be left to the jury. The Federal court holds that neither of these defenses has any place in the law, and therefore refuses to instruct upon them. The State court, by a less direct method, reaches substantially the same result. It holds that there can be no assumption of risk as to those risks which are inherent in the work. Since these are the only risks upon which liability is predicated, the plea of assumption of other risks having nothing to do with the liability obviously could not avail. Yet the State court holds that the plea may be made as to these other risks, and that the defense, therefore, is not abrogated. This is aptly characterized by Justice Ross as an absurdity. (Inspiration Consolidated Copper Co. *vs.* Mendez, 166 Pacific, 278, 1183.) Likewise as to "contributory negligence" the Supreme Court holds that the defendant can avail himself of this plea only at the expense of admitting his own negligence, and thus importing into the case an issue which the plaintiff has not presented, and that the defendant by pleading this defense estops himself from denying his own negligence (*Id.*, 278). Thus, as construed by the State court, the employer has no real defense.

The recovery authorized is unlimited. The Supreme Court justifies the law in part upon the ground that the damages could not be limited under the State Constitution (166 Pacific, 278). The recovery is not confined to "compensation." It is not limited to a portion or even to all of the loss of earn-

ings or earning power. It is an award of "damages" to be determined from "all the facts of the case" (Hammer case, printed extract, page 15). It covers mental and physical pain and anguish and disfigurement (Bray case, printed extract, page 14). It means damages as estimated in tort actions (Dissent of Ross, Superior and Pittsburgh Copper Co. *vs.* Tomich, 165 Pacific, at page 1186). This is clear also from the majority opinion in the Tomich case (165 Pacific, 1101).

In case of injuries resulting in death, the law does not confine the liability to instances where dependent relatives survive. Where no dependent relatives survive, the employer is still liable in damages to the administrator for the benefit of the estate. This can only mean damages estimated in terms of probable future earnings of the deceased, had he lived, measured by his life expectancy.

Such is the Arizona law. It creates unlimited liability for non-negligent accidents, to be enforced in a judicial proceeding in which the defendant has no defense, and prescribes a measure of damages such as the common law imposes as a punishment for wrong (244 U. S., 147, at 164).

The rules of the common law permitting pain, suffering, mental and physical anguish, humiliation, and disfiguration to be considered as elements for which damages may be awarded have served only to afford judicial sanction for unjust and highly excessive awards, awards out of all proportion to the injuries sustained and to the standards fixed by amicable settlements between rational men. The courts, both trial and appellate, are exceedingly reluctant to disturb the jury's award, until the books abound in examples of verdicts sustained of ten thousand, twenty thousand, thirty thousand, and even fifty thousand dollars. Unless the particular recovery offends the conscience of the court, it must be allowed to stand. There being confessedly no means of measuring the money value of these elements, no practicable limit can be placed upon the jury's action. The administration of

this law already shows that what is true of common-law cases is equally true of the law under attack. The same principles are applied by the highest court of Arizona to verdicts rendered under this law as to verdicts based on negligence (Superior and Pittsburgh Copper Co. *vs.* Tomich, 165 Pacific, 1101, at 1104, paragraph 7). This very situation was commented on by Justice Ross in his dissent at page 1186.

As thus construed and administered the law cannot be sustained as a proper exercise of the police power.

It cannot be justified as a measure regulating dangerous employments. Its declared purpose is to protect the safety of workmen. It does not protect. No duties are imposed on the employer. He is held liable for unpreventable accidents—for inevitable casualties—due in no degree to human fault. What is not caused by negligence cannot be prevented by care. The declaration of purpose, therefore, is out of harmony with the liability imposed. There is also a provision as to the promulgation of rules by the employer. The promulgation of rules and their enforcement can neither prevent inevitable accidents nor furnish the employer any solace under this law. In none of the cases in this court was the question of rules involved. This provision in the law is also a false quantity. As Justice Pitney said in Coppage *vs.* Kansas, 236 U. S., 1, at page 15:

> "* * * When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the State court."

As Justice Grier said in the Passenger Cases, 7 How., 283, 458, "its true character cannot be changed by its collocation." Clearly this law does not regulate dangerous employments in any sense.

Adams *vs.* Tanner, 244 U. S., 590, 593.

Does it affect the general welfare?

This court held in the White case that—

> "laws regulating the responsibility of employers for injury to their employees arising out of the employment * * * may be regarded as coming within the category of police regulations."

The New York law under consideration "regulates" in a most thoroughgoing manner. This law regulates nothing. It simply imposes liability, and its "procedural provisions" afford the employer only the single right of listening to the verdict.

If we assume that this law falls "within the category of police regulations" simply because it relates to the liability of master and servant (see Lochner *vs.* New York, 198 U. S., at page 56, *et seq.*), the question arises as to its reasonableness.

If the public need has any bearing upon the question of the reasonableness of a law purporting to be passed to protect it, this law is clearly beyond the fair limit of police regulation. It penalizes the employer as for a wrong, when he has done no wrong. It opens the door for damages based upon elements that cannot be fairly measured in money, and with which the public has no possible concern. He is subjected to liability according to common-law standards, but is deprived of common-law defenses. If guilty of negligence, and sued therefor, he may defend and may conceivably escape all liability. If free from fault his guilt is prejudged, and there is no escape from punishment. No free government can be interested in such a result, except to destroy the infamous measure that makes such a result possible. If the injured workman dies from the hurt, leaving no dependents, his administrator may nevertheless ask a jury to determine how much the deceased would probably have earned during his natural expectancy of life, and the employer must hand it over for the benefit of non-dependent heirs, probably rich to affluance, or in default of all heirs, to escheat to the State.

If such a law is to be sustained as consonant with natural justice as understood by fair-minded and rational men, it must be because there is no power anywhere which can prevent legislatures from arbitrarily providing that private property shall be transferred from one person to another without compensation. There is no distinction in principle between the every-day result of the operation of this law and the extreme illustration just given, and suggested by this court in Davidson *vs.* New Orleans, 96 U. S., 97, at page 102.

What has been said is not so much a denunciation of the jury system as it is a criticism of the principles that govern the jury's deliberations in the assessment of damages. It might be possible to pass a valid law founded upon the principles which lie at the bottom of the compensation system, providing for compensation to be awarded by a jury instead of by a board. The point is that the principles governing the award, by whomever it is made, must be fair and reasonable and calculated to achieve results that will bear a real relation to the public interest.

The legal principle that differentiates this law from the compensation acts sustained by this court is that those laws provide for compensation based upon earning power, while this law establishes liability for damages based upon considerations in which the public is in nowise interested. Those laws expressly or in effect supplant the common law with a juster system, while this law leaves the old law in effect and adds a new lawsuit, with predetermined liability. Those laws solve the problem along the lines of the best thought of the age; this law ignores all that is best in modern industrial advance. It adheres to litigation and makes litigation so oppressive to the employer and so attractive to labor that it constitutes a serious menace not only to the further progress, but to the very existence, of the compensation system in America.

In conclusion, the Arizona law "is arbitrary and unreasonable from the standpoint of natural justice" (243 U. S., 188, 202). "It transcends the limits of permissible State action"

(*Id.*, 202). It deprives the employer of his property without due process of law, and oversteps that measurable interference with private right which under any view can be sustained. "Either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States" (Fletcher *vs.* Peck, 4 Cranch, 87, at 139) the State is restrained from enforcing such a law. It should be annulled.

Respectfully submitted,

EDWARD W. RICE.